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No. 84-966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

SEABOARD SYSTEM RAILROAD, INC.
Petitioner,

v.

BROTHERHOOD OF RAILROAD SIGNALMEN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT BROTHERHOOD OF RAILROAD SIGNALMEN IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the doctrine of law of the case foreclosed further review by the Seventh Circuit because of that court's decision in a prior appeal on virtually identical grounds.

2. Whether, assuming for the sake of argument that the doctrine of law of the case did not preclude further review, petitioner could obtain relief under the three exceedingly narrow grounds for review permitted in arbitration awards issued under Section 3 of the Railway Labor Act (45 U.S.C. § 153, First (p), (q), Second).

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Respondent, Brotherhood of Railroad Signalmen [hereinafter, "BRS" or "Brotherhood"] respectfully requests that the Petition for Writ of Certiorari of petitioner Seaboard System Railroad, Inc. [hereinafter, "Seaboard" or "carrier"] to review the judgment of the United States Court of Appeals for the Seventh Circuit at issue herein be denied.

OPINIONS BELOW, JURISDICTION AND STATUTORY PROVISION INVOLVED

The Opinions Below, Jurisdiction, and Statutory Provision Involved are adequately set forth in the Petition for a Writ of Certiorari.[1]

[1] The Respondent also incorporates by reference the Petitioner's Appendix [hereinafter, "Pet. App. at ___"].

STATEMENT OF THE CASE

The procedural history of this case began when the BRS filed this action in the United States District Court for the Southern District of Illinois on December 13, 1979. The BRS filed a Petition to Enforce Award No. 1, Case No. 1 [hereinafter, "Award"] of Public Law Board No. 1998 [hereinafter, "the Board"] (Pet. App. at 39a-45a) as interpreted by the Board at the request of BRS (Pet. App. at 46a-47a),[2] pursuant to the terms of Section 3, First (p) and Section 3, Second of the Railway Labor Act, 45 U.S.C. § 153, First (p) and § 153, Second. The filing of the Brotherhood's enforcement petition was a result of the failure of the carrier to comply with the terms of the Award issued by the Board on January 24, 1978, and the Interpretation of that Award (requested by BRS) by the Board which was issued on January 9, 1979.

In the Award and the Interpretation that followed, the Board had sustained the claim of G. L. Choate (hereinafter, "Choate") against the carrier. Choate had claimed that he had been wrongfully dismissed by the Louisville and Nashville Railroad [hereinafter, "L&N"], and sought reinstatement to his former position, along with back pay for time lost, and restoration of all rights unimpaired pursuant to the applicable rule of the collective bargaining agreement (quoted by the Board in its Interpretation) (Pet. App. at 47a).

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[2] The carrier's statement that the Board's Interpretation commented that the disability issue was one of compliance for the courts and beyond the Board's jurisdiction (Pet. App. at 7, n.5) is just flat wrong. The Board's statement that compliance was a judicial matter was specifically directed to BRS's request that the Board ". . . clarify the Carrier's responsibility under the Award." Pet. App. at 46a. It resolved that issue by setting out the rule of the collective bargaining agreement concerning the consequences of a finding that the charges against a dismissed employee were not sustained, to wit, ". . . he shall be reinstated . . . and paid for time lost." Pet. App. at 46a-47a. The Board then stated that the claimant's status during the handling of the claim (i.e., his "disability") was not raised by the carrier in the handling of the claim on the property. Pet. App. at 47a.

The carrier filed its Answer and Affirmative Defense on February 14, 1980, denying the principal allegations of the BRS Petition to Enforce. BRS subsequently filed a Motion for Summary Judgment on February 28, 1981, which the L&N opposed with its Objections and its own Motion for Summary Judgment, filed March 2, 1981. The District Court heard argument on the cross motions on March 6, 1981. BRS then filed a brief in response to the L&N's motion, to which L&N filed a reply, and a supplemental reply.

On April 23, 1981, the District Court entered judgment in favor of the BRS and against the carrier, and ordered the carrier to comply with the Board's Award. The first appeal by the L&N followed. The facts below up through the first appeal (688 F.2d 535 (7th Cir. 1981)) are fully set forth in the Findings of Fact of District Judge Beatty which were adopted *in toto* by a majority of the Seventh Circuit panel considering the case, appearing at 688 F.2d 538-42.

After the Seventh Circuit's affirmance of the first District Court order, on November 5, 1982, the District Court set forth a schedule for the submission of affidavits and memoranda by the parties on the issue of monetary and other relief to be awarded to comply with the decision of Public Law Board 1998 enforced herein. Both parties submitted affidavits and memoranda in support of their respective positions with respect to what was required for compliance. The carrier's only points in the District Court below were related to precisely the same issues that were decided adversely when it was first before the Seventh Circuit (except with respect to its challenge of the award of interest). The District Court, noting that the carrier was presenting nothing new with respect to its challenges to enforcement of the award, once again issued an order granting judgment to BRS (on behalf of claimant George L. Choate) for $142,306.94 in back pay, interest from January 9, 1979, and attorney's fees. The carrier moved for a new trial claiming that the District Court lacked jurisdiction to determine a remedy because the award was ambiguous, that the Seventh Circuit and

the District Court had both mistakenly assumed that the Board had considered evidence of Choate's disability, and that the interest award was improper. After denial of the motion the Seventh Circuit affirmed primarily on the ground of law of the case (Pet. App. at 1a-5a).

REASONS FOR DENYING THE WRIT

I. The Doctrine of Law of the Case Precludes Further Review of This Matter.

The carrier first complains that the District Court and the Seventh Circuit in essence arrogated to themselves the exclusive jurisdiction of the Public Law Board in ordering payment of a sum certain, reinstatement, interest and attorney fees (Pet. App. at 9a-11a). This is the same point it argued in the prior appeal. There the carrier's position was that the Public Law Board's order did not mandate a return to work and computation of damages based upon the amount of time out of work because claimant was receiving disability benefits from the Railroad Retirement Board. The majority opinion of Judge Wood, and the concurring opinion of Judge Will in the first appeal, both adopted the previous opinion of Judge Beatty in the district court, setting it forth in full in the opinion. 688 F.2d at 538-44. That issue was clearly resolved adversely to the carrier. If the carrier had any real dispute with respect to the previous opinion, it should have filed a petition for a writ of certiorari at that time, rather than prolong this already overextended matter (to use the words of Judge Will (Pet. App. at 28a)) into eternity.

In the second appeal the carrier plainly took issue with the majority opinion in the first appeal, urging, in part, adoption of the position of Judge Posner *in dissent* in the first appeal. It is axiomatic that a dissent is not the controlling law of a case. Moreover, the doctrine of law of the case is that matters decided on appeal become the law of the case, and thus are binding in a second appeal, absent a plain error of law. *See, Appleton Electric Company* v. *Groves Truck Lines,* 635 F.2d 603 (7th Cir. 1980). Unless the record demonstrates that the

decision below on the second appeal was clearly erroneous or involved a novel question of law, further review is absolutely foreclosed. *Id.* The Seventh Circuit decided in the second appeal that the carrier utterly failed to make a case for reconsideration of the correctly applied law when this case was first before it, correctly observing that if the carrier had been dissatisfied in the first appeal, it could have petitioned for rehearing or sought a writ of certiorari. *It did neither.*

The carrier's second issue questions whether the monetary and other relief contained in the current judgment entry of the District Court, affirmed by the Seventh Circuit in the second appeal, exceeds that to which the plaintiff is entitled under the collective bargaining agreement and applicable Public Law Board decisions and is but a restatement of the carrier's first issue. The award of Public Law Board 1998 as interpreted by the neutral did not change between the carrier's appeals. The carrier well knew and indeed argued to the Seventh Circuit in the first appeal that the claimed disability of the claimant herein mandated reversal. The Court did not then do anything other than send this case back to the District Court for enforcement of its orders in the second appeal in light of the clear findings of fact of the District Court which were adopted by the Seventh Circuit in its opinion in the first appeal.

Moreover, the carrier's position does not bear analysis when consideration is given to the well settled law in this area that a court may compute the actual dollars and cents due a rail employee if the award is sufficiently clear to permit such computation. *See, Sweeney* v. *Florida East Coast Ry. Co.*, 389 F.2d 113 (5th Cir. 1968). Exhaustive review by two separate panels of the Seventh Circuit led that court to the conclusion in both appeals that the award herein, and the interpretation issued thereon are sufficiently clear to permit the judgment and computation contained in District Court orders involved herein. The carrier has offered no basis to disturb application of the doctrine of the case herein.

II. The Carrier Has Failed to Establish Any of the Three Factors Necessary for Review of Awards of Public Law Boards Under the Railway Labor Act.

As Judge Wood stated in the majority opinion in the first appeal to the Seventh Circuit:

> At the outset, we recognize, as did the district court, that the scope of judicial review in proceedings to enforce an award of the Public Law Board is among the narrowest in the Law. *Diamond* v. *Terminal Railway Alabama State Docks,* 421 F.2d 228, 233 (5th Cir. 1970); *see also Union Pacific Railroad Co.* v. *Sheehan,* 439 U.S. 89, 93, 99 S.Ct. 399, 401, 58 L.Ed.2d 354 (1978) (narrow scope of review applies to both questions of fact and questions of law). The Board's order may be set aside only if the Board failed to comply with the requirements of the Railway Labor Act, failed to confine the order or itself to matters properly within the scope of its jurisdiction, or for fraud or corruption by a member of the division making the order. 45 U.S.C. § 153, First (p).

688 F.2d at 537.

This Court stated in *Union Pacific Railroad Co.* v. *Sheehan,* 439 U.S. 89 (1978) that it has time and time again held that the precise requirements of 45 U.S.C. § 153 First (p) must be met before review is possible. Twice the District Court and the Seventh Circuit have both decided that the carrier has failed to meet the high standard of review contained in the statute.[3] As the District Court stated when this issue was first before it:

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[3] The carrier's argument that its petition should be granted on the grounds that the award did not comply with the requirement of 45 U.S.C. § 153 First (o) that an award direct a carrier to pay the employee the sum to which he is entitled under the award on or before a day named (Pet. App. at 15a-16a) has never been raised before and should not be considered for that reason alone. Moreover, the specious nature of the carrier's argument on this point is revealed by its admission that it is triggered by the district court's failure to adopt Seaboard's position on Choate's receipt of disability benefits. Pet. App. at 16, n.10. In enforcing the Award at issue, the district court and the Seventh Circuit on appeal correctly resolved that matter in accordance with well-settled law. Pet. App. at 13a-14a, 25a-26a.

> 4. The history of judicial interpretations of dispute resolution, enforcement and review provisions of the Railway Labor Act, is replete with instances of confirmation of the limited role of Courts in the resolution of minor disputes under the Railway Labor Act. *See, Andrews* v. *Louisville and Nashville Railroad Co.,* 406 U.S. 320, 92 S.Ct. 1562, 32 L.Ed.2d 95 (1972); *Gunther* v. *San Diego and Arizona Eastern Ry. Co.,* 382 U.S. 257, 86 S.Ct. 368, 15 L.Ed2d 308 (1965); *Denver and Rio Grande R.R.* v. *Blackett,* 538 F.2d 291 (10th Cir. 1976).

688 F.2d at 542-43.

Finally, the carrier's conduct in this case contravenes the public policy clearly intended by the Congress that grievances on this nation's railroads be determined by Boards created under the Railway Labor Act, and not by the courts. As the order of the Seventh Circuit in the second appeal states in its ultimate paragraph:

> This order should mark the end of an "already over-extended case." 688 F.2d at 545 (Will, J., concurring). Protracted cases such as this one undermine Congress's attempts to have labor disputes resolved principally by arbitration.

Pet. App. at 5a. Petitioner offers no convincing reasons for reviewing the Seventh Circuit's decision on the second appeal, which is clearly without error in light of the well-settled law on the topic of review of Board Awards under the Railway Labor Act.

CONCLUSION

For the foregoing reasons, Respondent Brotherhood of Railroad Signalmen respectfully submits that the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be denied.

Respectfully submitted,

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